Filed 4/9/10 P. v. Bryant CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SASSONY WYKEIMPAIGE BRYANT, Defendant and Appellant.	B215736 (Los Angeles County Super. Ct. No. MA044559)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and David C. Cook, Deputy Attorneys General, for Plaintiff and Respondent.

RELEVANT PROCEDURAL HISTORY

On January 30, 2009, an information was filed charging appellant Sassony Wykeimpaige Bryant under count 1 with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), and under count 2 with resisting an executive officer (Pen. Code, § 69).[1] Appellant pleaded not guilty. On April 17, 2009, a jury found appellant not guilty of assault with a deadly weapon and guilty of resisting an executive officer. The trial court sentenced appellant to 16 months in prison.

FACTUAL BACKGROUND

A. *Prosecution Evidence*

Los Angeles County Deputy Sheriff Miguel Torres testified as follows: At noon on January 13, 2009, he was returning to his station in a police car. Although the car was unmarked, Torres wore a "raid jacket" with the words "Sheriff's Deputies" on it.[2] As Torres was driving near Lancaster High School, he saw appellant hop off a retaining wall, yell at some students, and adopt a fighting stance. Torres drove his car around a block, requested help from a backup unit, and returned to appellant's location. As Torres drew near, a student noticed him and yelled, "He's got a knife." Torres saw that appellant had seized another student and was holding a shiny object to the student's throat. Other students were backing away from appellant.

Torres stopped the car in front of appellant, turned on a red light, and left the car. He ordered appellant to drop the knife and pointed his firearm at appellant.

---

[1] All statutory citations are to the Penal Code.

[2] The reporter's transcript states that Torres was wearing a "ray" jacket. This appears to be a typographical error.

Appellant answered, "Fuck you. This ain't no knife." He released the student and asked Torres to put away his gun. In response to Torres's repeated orders that appellant drop the object, appellant pointed the object at Torres, said, "Fuck you. This ain't no knife," and eventually placed the object on a nearby retaining wall. Torres ordered appellant to get on the ground, and appellant replied, "Fuck you. I didn't do anything."

When Torres saw a backup unit approaching, he put away his gun. Appellant charged at Torres, who grappled with him. As appellant struggled to get away from Torres, Deputy Sheriffs Jarrod Wilson and Sarah Dieguez arrived in a backup unit. They approached from behind appellant, attempted to restrain his arms, and dropped him to the ground. Appellant resisted them by kicking and trying to free his arms. He repeatedly yelled, "I didn't do anything." After Torres placed his weight on appellant's back, the deputy sheriffs were able to handcuff him.

According to Torres, the incident lasted one and one-half minutes, and ultimately involved nine or ten deputies. The students left the area during the incident, and Torres could not locate them after appellant had been handcuffed. The deputies found a comb whose handle had been modified to expose metal.

Deputy Sheriff Jarrod Wilson testified that on January 13, 2009, he and Deputy Sheriff Sarah Dieguez responded to a call from a deputy confronting a person with a knife. They were uniformed and in a marked patrol car. As they arrived, Wilson saw Torres and appellant standing near each other. Torres held up an arm towards appellant, pointed at the ground, and appeared to order appellant to get down. Appellant moved left and right in a fighting stance with his fists raised. As Wilson and Dieguez ran up, appellant lunged at Torres, who extended his arm against appellant and held his shirt. Wilson grabbed appellant, and they fell to the ground. Wilson repeatedly ordered appellant to stop fighting, but he struggled to

free himself from Wilson. With the help of other deputy sheriffs, Wilson eventually gained control of appellant's left arm and began to handcuff him. Wilson received several small cuts on his hands during the arrest.

Deputy Sheriff Sarah Dieguez testified that when she arrived at the scene, appellant was in a boxing stance facing Torres, who repeatedly ordered appellant to get on the ground. Appellant pushed at Torres, who held out an arm to keep appellant away. Dieguez tried to seize appellant's shoulders while Wilson grabbed his back, and they all fell to the ground. On the ground, appellant flailed his arms and tried to kick the deputy sheriffs. Both Dieguez and Wilson repeatedly ordered appellant to stop fighting, but he did not do so. With the aid of other deputy sheriffs, Dieguez and Wilson gained control of appellant, who was handcuffed. Dieguez received cuts on her elbow and wrist during the encounter.

B. *Defense Evidence*

Appellant testified on his own behalf. According to appellant, he suffers from manic depression and hears voices. He obtained a comb with a sharp metal end from his girlfriend. The sharp end is designed to permit people with thick hair to part their hair.

Appellant further testified that on January 13, 2009, he was standing near a retaining wall and combing his hair when two Hispanic males and a female walked by him. Aside from a brief, cordial remark, he had no conversation with them. As the trio passed appellant, Deputy Sheriff Torres stopped his car in front of appellant and asked where he went to school. When appellant answered that he "was grown," Torres left his car, drew his gun, and told appellant to "put the knife down." Appellant responded, "This ain't no fuckin' knife." When appellant tried to show Torres that he held only a comb, Torres insisted that he put it down, and appellant complied.

Appellant provided two versions of the subsequent events. On direct examination, appellant testified that when Torres ordered him to lie down on the ground, appellant refused and said, "I didn't do anything wrong." Torres holstered his gun, walked up to appellant, grabbed him by the collar, and said, "Wait until my buddies get here." A few seconds later, several deputies tackled appellant and threw him to the ground. When they shouted, "Stop resisting," he answered, "I'm not fighting." He did not kick, and tried only to interlock his hands so that he could be handcuffed. In less than a minute, they handcuffed him.

On cross-examination, appellant testified that after Torres ordered him to lie down, he complied before the other deputies arrived. According to appellant, when Torres grabbed him, he "went down willingly." Other deputy sheriffs then "came from every angle." Although he was not fighting them, they repeatedly ordered him to stop his resistance.[3]

DISCUSSION

Appellant challenges his conviction under count 2 for violating section 69, which provides that it is an offense to "attempt[], by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or . . . knowingly resist[], by the use of force or violence, such officer." As Witkin and Epstein explain, "[t]he term 'executive officer[]' . . . includes a police officer, and the statute covers violent interference." (2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 119, p. 1212.) Appellant contends (1) that prosecutorial misconduct and related instructional error denied him a fair trial, and

[3] A videorecording of an interview of appellant by investigating officers following the incident was also played for the jury.

(2) that there was instructional error regarding the elements of resisting an executive officer. Finding no error, we affirm.

A. *Uncharged Criminal Conduct*

Appellant contends the prosecutor and the jury instructions improperly invited the jury to find him guilty of resisting an executive officer on the basis of criminal conduct not alleged in the information. He argues that although the information alleged only that appellant had resisted Deputy Sheriff Torres, the prosecutor and the jury instructions permitted the jury to convict appellant for resisting Deputy Sheriffs Wilson and Dieguez. As explained below, we conclude this contention fails in light of the so-called "informal amendment doctrine," which constitutes a judicial recognition that an information may be amended without written alterations to it. (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 133 (*Sandoval*).)

1. *Underlying Proceedings*

The sole witness at the preliminary hearing was Torres, whose description of the incident closely resembled his later trial testimony. At the preliminary hearing, Torres stated that appellant refused to obey his orders even though Torres had drawn his firearm, and that he put away his firearm when he saw other deputy sheriffs arrive with "lights and sirens." Regarding the subsequent events, Torres testified as follows:

"Q. And what, if anything, did [appellant] do?

"A. At that point he took one step towards me and charged me, and then I put my arm out and held him by the collar.

"Q. When you held him by the collar, did he struggle with you?

"A. Yes. He tried to come at me, and when I decided to take advantage of that motion and take him down, he saw . . . what I was doing, and he now tried to go back. But at that point the deputies were already out of their vehicles and trying to get him down to the ground and successfully took him down to the ground.

"Q. When you say they successfully took him down to the ground, can you describe what the other deputies did in order to bring him down to the ground?

"A. What they tr[ied] to do first is they tr[ied] to grab his arms to handcuff him, and he wouldn't comply. And he would bring his arms towards the front. At this point I had already let him go so at that point they took him down.

"Q. Did he resist these deputies when they attempted to bring him down?

"A. Yes, he did.

"Q. And how did he resist? [¶] . . . [¶]

"[A.] He resisted by trying to keep his arms in the front [and] by kicking backwards, just trying to change his stance, his balance.

"Q. . . . At some point did the deputies -- were they able to handcuff him?

"A. Yes, they were."

At trial, neither the court nor the attorneys informed the jury that the information, as filed, named only Torres as an executive officer whom appellant had resisted. The prosecutor, in her opening statement, focused on appellant's resistance to Torres, but noted that appellant had struggled as well with other deputies who came to Torres's assistance. The jury instructions and the verdict form regarding count 2 described the offense without naming the specific officer or officers whom appellant had allegedly resisted. In connection with count 2, the jury also received a unanimity instruction (CALJIC No. 17.01), which stated in pertinent part: "The prosecution has introduced evidence for the purpose of showing that there is more than one act upon which a conviction . . . may be based. . . . [I]n order to return a verdict of guilty . . . , all jurors must agree that he

committed the same act . . . ." Defense counsel raised no objection to the instructions and verdict form, despite the trial court's request for his objections.

In the opening portion of her closing argument, the prosecutor underscored appellant's resistance to Torres, but also explained that appellant had struggled with Wilson and Dieguez while they were "in the performance of their duty in getting [appellant] to submit to detention and arrest." After examining the evidence bearing on appellant's resistance to the three deputies, the prosecutor concluded: "[Y]ou can find [appellant] guilty of . . . resisting an executive officer because we know that he did not comply with the orders of . . . Torres, . . . Dieguez, and . . . Wilson." Defense counsel asserted no objection to this argument. During closing argument, he maintained that appellant had neither threatened nor used violence against Torres and the other deputies who arrested him; in addition, he argued that Dieguez and the other deputies had used unreasonable force in arresting appellant. In the final portion of closing argument, the prosecutor asserted that all three deputies had used reasonable force in "making a lawful arrest and detention."

2. *Analysis*

Appellant contends that he was denied due process and a fair trial because the prosecutor's closing argument and the jury instructions permitted the jury to convict him on the basis of his resistance to Wilson and Dieguez, even though they were not named in the information as officers whom he had resisted. We disagree.

Generally, the purpose of an accusatory pleading is "'to provide the accused with reasonable notice of the charges.'" (*Sandoval*, *supra*, 140 Cal.App.4th at p. 132, quoting *People v. Ruiloboa* (2005) 131 Cal.App.4th 674, 689-690.) Nonetheless, the Penal Code permits accusatory pleadings to be amended at any stage of the proceedings "for any defect or insufficiency" (§ 1009), and bars

reversal of a criminal judgment "by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits" (§ 960). The information may be amended after the conclusion of the trial, prior to submission of the case to the jury. (*People v. Witt* (1975) 53 Cal.App.3d 154, 164-166, disapproved on another ground in *People v. Posey* (2004) 32 Cal.4th 193, 205, fn. 5; *People v. Walker* (1947) 82 Cal.App.2d 196, 198-199.)

As our Supreme Court has explained, the statutory scheme permits the amendment of an information to assert a new offense: "An information is deficient . . . so as to permit of its amendment, when it fails to charge one or more of the offenses shown by the evidence at the preliminary examination. [Citation.] [Section 1009] forbids, however, an amendment which charges 'an offense not shown by the evidence taken at the preliminary examination.' . . . [¶] It is established that the provision of . . . section [1009] allowing an amendment of an information so as to add an offense shown by the evidence at the preliminary examination[] does not violate a defendant's constitutional rights." (*People v. Tallman* (1945) 27 Cal.2d 209, 213.)

It is also well established that "[t]he proceedings in the trial court may constitute an informal amendment of the accusatory proceeding, when the defendant's conduct or circumstances created by him amount to an implied consent to the amendment." (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 213, at p. 418.) As the court explained in *Sandoval*, "[t]he informal amendment doctrine makes it clear that California law does not attach any talismanic significance to the existence of a written information. Under this doctrine, a defendant's conduct may effect an informal amendment of an information without the People having formally filed a written amendment to the information." (*Sandoval, supra*, 140 Cal.App.4th at p. 133.)

An instructive application of this doctrine is found in *People v. Toro* (1989) 47 Cal.3d 966, 973, disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568. There, the information charged the defendant with attempted murder and assault with a deadly weapon. (*Id*. at p. 972.) In addition to these offenses, the jury was instructed regarding the offense of battery with serious bodily injury, which the instructions and verdict forms erroneously described as a lesser included offense of attempted murder. (*Id*. at p. 973.) The defendant's counsel raised no objection to the instructions and verdict form regarding battery with serious bodily injury, or to the jury's consideration of the offense. (*Id*. at p. 977.) Noting that such failure to object may be """regarded as an implied consent to treat the information as having been amended to include the offense on which the sentence was imposed,""" our Supreme Court concluded that the defendant had impliedly consented to the submission of the charge to the jury, and had forfeited any contention of error. (*Id*. at pp. 976-977, quoting *People v. Francis* (1969) 71 Cal.2d 66, 75; see also *People v. Coryell* (2003) 110 Cal.App.4th 1299, 1307-1308 [defendant was not denied due process when information alleged only one victim of carjacking and defendant raised no objection to prosecutor's closing argument that evidence at trial showed that there were two victims].)

In our view, the parties, by their conduct, effectively amended the information to identify Torres, Wilson, and Dieguez as executive officers whom appellant had allegedly resisted, for purposes of count 2. The import of the instructions and verdict form, taken together with the prosecutor's argument, was that appellant had allegedly resisted all three officers. Appellant never challenged the instruction or forms, and never raised any objection to the prosecutor's closing argument, prior to this appeal.

Appellant suggests that any such amendment was improper because Torres's testimony at the preliminary hearing was "vague" and "non-specific" regarding appellant's resistance to Wilson and Dieguez. He argues that the trial court would have been obliged to deny an express request to amend the information to add charges regarding Wilson and Dieguez had the prosecutor made such a request during trial. This contention has been forfeited because no objection to the informal amendment was asserted in the trial court. (See *People v. Lewis* (1983) 147 Cal.App.3d 1135, 1140 [defendant must object to trial court regarding amendment of information to include new offense in order to preserve contention on appeal]; *People v. Albin* (1970) 9 Cal.App.3d 31, 37-38 [defendant forfeited contention that information failed to identify correct victim by failing to object before trial court].)

The contention also fails on the merits. To establish an offense at the preliminary hearing, the prosecution need only show that "there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it." (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.) During the hearing, Torres testified that appellant forcibly resisted the deputies who first arrived to aid Torres and who tried to do so by compelling appellant -- who was then standing -- to lie on the ground. Although Torres did not identify Wilson and Dieguez by name as the deputies so described, his testimony is sufficient to support the amendment, as the names of the victims of an offense are not required in an information when, as here, their identities are available or known to the appellant (*Canon v. Justice Court* (1964) 61 Cal.2d 446, 450-451; *People v. McGlothen* (1987) 190 Cal.App.3d 1005, 1014).

Appellant also contends that the trial court erred in giving the unanimity instruction because it invited the jury to convict him under count 2 for his resistance to Wilson and Dieguez. Because count 2 was informally amended to

encompass appellant's resistance to Wilson and Dieguez, the unanimity instruction was proper. When several offenses of the same kind but involving different victims are charged under a single count, and each offense potentially constitutes a separate offense, it is appropriate to give a unanimity instruction. (*People v. McNeill* (1980) 112 Cal.App.3d 330, 334-335.)

Finally, appellant contends that defense counsel rendered ineffective assistance by failing to object to the prosecutor's closing argument, the instructions, and the verdict forms.[4] We disagree. Defense counsel does not render ineffective assistance by declining to raise meritless objections. (*People v. Price* (1991) 1 Cal.4th 324, 387.) As we have explained, there would have been no meritorious basis for denying an express request to amend the information to include charges that appellant had resisted Wilson and Dieguez. In sum, appellant was denied neither due process nor a fair trial regarding count 2.

B. *Instructional Error*

Appellant contends that the trial court misinstructed the jury regarding the intent required for resisting an executive officer. Section 69 establishes two related offenses with different elements, namely, "attempting to deter and actually resisting an officer." (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1530.) Whereas the former is a specific intent crime (*ibid*.), the latter is a general intent

---

[4] "In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citations.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)

crime (*People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, Supp. 8). Appellant argues that the instructions regarding count 2 failed to inform the jury regarding the special intent required for attempting to deter an officer. For the reasons explained below, appellant has failed to establish reversible error.

Generally, the adequacy of any instruction given must be judged in the context of all the instructions. (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 663, pp. 953-954.) Thus, an instruction is not assessed in isolation, but must be viewed in the context of the overall charge. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013.) When an instruction is potentially ambiguous or misleading, the instruction is not reversible error unless there is a reasonable likelihood that the jurors misunderstood or misapplied the pertinent instruction. (*Ibid*.; *People v. Avena* (1996) 13 Cal.4th 394, 416-417.)

Here, the jury was instructed with a version of CALJIC No. 7.50, which stated in pertinent part: "Defendant is accused in Count 2 of having violated section 69 of the Penal Code, a crime. [¶] Every person who willfully and unlawfully attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon that officer by law, or who knowingly resists, by the use of force or violence, an executive officer in the performance of his or her duty, is guilty of a violation of Penal Code section 69, a crime. [¶] . . . [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person knowingly and unlawfully resisted an executive officer in the performance of his or her duty; and [¶] 2. The resistance was accomplished by means of force or violence."

Appellant contends that this instruction was erroneous because it mentioned both offenses established under section 69, but failed to specify the elements of attempting to deter an officer, including the specific intent required for the offense. In our view, the instruction's potential to mislead was nullified by the prosecutor's

closing argument, which clarified that appellant was charged only with the offense of *actually* resisting an officer. The prosecutor argued: "[Under] count 2, which is resisting and obstructing an executive officer in the performance of his duty, the People must prove that the defendant knowingly and unlawfully resisted an executive officer in the performance of his or her duty and the resistance was accomplished by means of force or violence. [¶] . . . [¶] *These are the two things the People have to show.*" (Italics added.) In the remaining portion of the argument, the prosecutor pointed to the evidence that appellant had refused to obey Torres, lunged into Torres, and then forcibly resisted Wilson and Dieguez.

Noting that defense counsel's closing argument briefly attacked the possibility that appellant had attempted to deter an officer, appellant argues that the prosecutor's closing argument did not cure the confusion created by the instruction. We are not persuaded. Defense counsel asserted that appellant's conduct toward Torres before their physical contact could not reasonably be viewed as a threat because appellant raised his fists only after Torres pointed his firearm at appellant. Defense counsel also argued in considerable detail that Torres initiated the physical contact, and that the deputies, rather than appellant, had wrongly used violence during the arrest. Viewed in context, defense counsel's remarks do not establish a reasonable likelihood that the instruction confused the jury regarding the prosecutor's express theory of guilt -- namely, that appellant had *actually* resisted an officer -- because the remarks encouraged the jury to focus its attention on that theory. In sum, we discern no reversible instructional error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.